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# LAWYERS, LAW, AND CONTRACT FORMATION

## Comments on Daniel Keating's 'Exploring the Battle of the Forms in Action'

*Robert K. Rasmussen\**

Attempting to infuse the austerity of theory with a dose of reality, an intrepid group of legal scholars has left the security of the office and ventured into the work-a-day world of commercial practices. The information that they have gathered and are sharing with the rest of us is furthering our understanding of the interaction between commercial law and commercial practice. Embedded in much of the research they have generated is the not-so-flattering conclusion that law professors suffer from a self-serving bias. Those of us in the academy engage in the assumption, often unstated or even unacknowledged, that the law significantly affects the behavior of parties to a contract. This belief in the force of law applies to all aspects of the contracting process: contract formation, contract interpretation, and the remedies available after a contract has been breached. This assumption of the importance of law enhances the status of commercial law professors in that it makes what we teach, and by implication us, important.

The easy link between statutes and cases — law on the books — and actual contracting practice — law in action — has been strained severely, if not shattered, by the various studies that have been produced so far, both in this Symposium and elsewhere. The stated goal of the recent empirical research in commercial law is to provide a richer understanding of the forces that shape transactions between private parties, with this understanding often being that law is less important than we may have thought before. While various researchers are using differing methodologies to examine commercial practice, one especially fruitful course of inquiry is to talk to the participants in the actual transactions. As an illustration, consider Professor Dan Keating's excellent contribution to this Symposium.<sup>1</sup> Professor Keating explores the role that standardized forms play in contracting behavior by talking to both buyers and sellers of goods. This method-

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1. See Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000).

ology traces back at least to Stewart Macaulay's famous study of business practices in Wisconsin.<sup>2</sup> The picture drawn by these "law in action" pieces enriches our understanding of commercial law, with the conclusion inevitably being that one cannot ascertain the way in which private parties contract between themselves by simply reading the applicable state-supplied legal rules. One has to talk to the players involved.

As Karl Llewellyn urged long ago, studies such as these serve as an important corrective to the natural academic tendency toward solipsism. We cannot simply assume that the statutes and cases that we teach provide a direct view into contracting behavior. In this cautionary tale for law teachers, there may also be a cautionary tale for empirical legal research. For there is no reason to believe that law professors have a monopoly on self-serving biases. Probably most of us have a need to view ourselves in a positive, if in fact unrealistic, way.<sup>3</sup> This tendency suggests that we should be careful about extrapolating from research that relies on interviews with commercial parties about their perceptions of commercial practice.<sup>4</sup> In particular, we might worry that the information received reflects the natural bias toward self-importance among those people to whom the researchers have spoken.<sup>5</sup> Recognizing the existence of the bias need not lessen the value of this research. Rather, a skeptical treatment of the information received can actually enhance its value.

There are at least three ways in which the self-importance bias may affect the lessons that should be drawn from this body of work. The first is that bias will affect the importance that commercial actors will attach to law. Based on the general tendency of everyone to inflate their own importance, nonlawyers would be less likely to acknowledge the law as an important part of their calculus, whereas lawyers would be more likely to do so. It is not that either nonlawyers or lawyers have a preferred perspective on the "true" state of affairs; rather, it is that law is the province of lawyers, and thus, lawyers will be more likely to perceive an important role for law in any given transaction

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2. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55 (1963).

3. See Albert Bandura, *Human Agency in Social Cognitive Theory*, 44 AM. PSYCHOLOGIST 1175, 1175-79 (1989); Jeff Greenberg et al., *Why Do People Need Self-Esteem? Converging Evidence That Self-Esteem Serves an Anxiety-Buffering Function*, 63 J. PERSONALITY & SOC. PSYCHOL. 913, 920 (1992).

4. Not all of the recent empirical research in commercial law has relied on such interviews. See, e.g., Ronald J. Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494 (2000) (relying on banking documents); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000) (relying on bankruptcy court filings).

5. See Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 854-60 (1995).

than would nonlawyers. Nonlawyers, on the other hand, presumably would emphasize those attributes of the transaction for which they have a comparative advantage.

There is a second way that the recognition of a self-serving bias on the part of those interviewed can add to what we learn from those interviews. The differing perceptions of lawyers and nonlawyers provides a glimpse into the workings of the firm. A standard criticism of economics — which can be extended to much of the empirical work on commercial law as well — is that it too often ignores how decisions are made inside a firm. A firm is treated as a “black box” that makes the value-maximizing decision. But information gathered from the field suggests that law can be a way for lawyers inside a firm to, at the margin, increase their status within the firm. In-house counsel can advance their position by emphasizing the importance of law, whereas others in the firm may find it in their interest to downplay law’s significance. To the extent that this is true, decisions by firms may not represent the optimal weighing of costs and benefits sometimes implied in the literature, but rather reflect the outcome of an internal struggle for power and prestige.

Finally, the likely presence of bias in descriptions of how commercial actors work complicates the normative stance we should take toward participants’ views of proposed changes in the law. The promise of seeking the wisdom of those in the field is that they can provide invaluable “situation sense” in assessing the likely impact of proposed reform.<sup>6</sup> The possibility of bias, however, makes it difficult to credit these observations uncritically. Indeed, the extent to which law reform efforts should take account of bias is a difficult question. On the one hand, bias may call into question the accuracy of some statements about the efficacy of a proposed change. On the other, it may lead to a resistance to embrace change, which would be a true cost in attempting to move toward a better legal regime.

Professor Keating’s work on the battle of the forms provides an excellent vehicle for exploring these issues. His article is itself a worthy addition to the growing empirical research on commercial law; it tackles one of the staples of the law school curriculum, section 2-207 of the Uniform Commercial Code (“U.C.C.”). At the same time, it provides concrete examples of how the bias of those interviewed may affect the vision of “law in action” that one receives. Whereas the researchers in other studies have spoken either primarily or exclusively with nonlawyers, Professor Keating deals primarily with lawyers. Professor Keating examines the contracting behavior of twenty-five firms.

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6. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268-85 (1960). For an excellent discussion of “situation sense” and its relation to practical reasoning, see Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

For nineteen of these firms, the information comes from lawyers.<sup>7</sup> This predominance of lawyers in the data set, as compared with the lack of lawyers in other reports, provides an opportunity to examine how the respective biases of lawyers and nonlawyers may affect conclusions about the impact of law in the work-a-day world.

One can readily understand why Professor Keating selected section 2-207 as the basis for his empirical study. Section 2-207's legendary opacity makes it an ideal doctrinal "nut" to crack: a contracts professor's dream, and a nightmare for students.

On first reading, one may be tempted to view Professor Keating's findings as consistent with other empirical work questioning the effect of legal rules in the real world. Indeed, Professor Keating's empirical research has shown that commercial practice has fared much better at surviving the thicket of section 2-207 than has the average law student. Many firms, Professor Keating reports, avoid engaging in a battle of the forms in the first instance, and those that do rarely become involved in disputes.<sup>8</sup> Moreover, such disputes that arise are, by and large, settled amicably. From this description it would be a short step to conclude that section 2-207 may serve the purposes of pedagogy, while it does not affect actual commercial practice.

While Professor Keating's research calls into question the number of times that section 2-207 may have to be invoked in order to flesh out a contract, there is a way in which his findings suggest a larger role for law than do other studies. By way of contrast, consider the article by Professor Lisa Bernstein presented at this symposium.<sup>9</sup> In her study of the cotton industry, Professor Bernstein finds law to be a distant, barely visible force. Not only has the cotton industry created a private legal system apart from the U.C.C., but the buyers and sellers in the cotton industry do not even act much in the shadow of this private legal system. Professor Bernstein's examinations of other industries have reached similar conclusions.<sup>10</sup> Yet for those to whom Professor Keating spoke, the law seems more immediate. For example, the decision of many sellers to enter into what Professor Keating terms a "fully dickered" contract is a decision that acknowledges the existence of law. It represents a decision to spend the time necessary to reach assent as to how certain future contingencies will be handled

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7. See Keating, *supra* note 1, at 2693.

8. Professor Macaulay reached similar conclusions. See Macaulay, *supra* note 2, at 59-60 (of 16 sales managers interviewed, 7 reported that they did not engage in a battle of the forms).

9. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Value Creation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. (forthcoming June 2001).

10. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGALSTUD. 115 (1992).

as opposed to relying on the terms that the law would apply were there to be divergent forms. Professor Keating reports that sellers often worried about being stuck with the U.C.C.'s default rule on consequential damages. Those who represented buyers, in contrast, were willing to rest on forms because of their comfort with the gap fillers provided by the U.C.C. Needless to say, these are determinations driven by the extant legal rules. Indeed, none of those interviewed seems to have expressed ignorance about section 2-207 or to have failed to think about the battle of the forms question.

It is of course possible that the attention paid to the law by Professor Keating's sources, as opposed to the lack of attention paid to the law by the sources in other studies, may be due to the fact that the sources worked in different industries in each study. It may be that contracting behavior in some industries is shaped by legal rules, while in others it is governed by nonlegal norms. There very well could be a heterogeneity of approaches to contract formation. Admittedly, there is no firm basis in the current empirical work for rejecting this hypothesis. There is no evidence that Professor Keating's subjects worked in the same industries as those studied by other researchers. Yet I want to suggest another possible explanation. The fact that Professor Keating spoke primarily to lawyers may have magnified the importance of law in the answers that he received.

The defining characteristic of lawyers is that they are experts in the law. Legal training provides lawyers with a set of skills and norms that supports a distinct professional identity. People in general tend to perceive the world in ways that increase their own status and importance.<sup>11</sup> For lawyers, this tendency could cause them to attach heightened importance to the law. The more that the law can affect a given transaction, the more that the lawyer is needed to ensure that the transaction proceeds without a hitch. Professor Keating's study, which is replete with references to law, arguably provides evidence to this effect.

The lessons for interpreting the data obtained by empirical researchers are twofold. First, we may be entitled to assume that studies relying predominately on the reporting of nonlawyers systematically understates the effect that law has on transactional behavior. Nonlawyers know that law is not their domain. To the extent that they perceive law as affecting their transaction, they are in effect acknowledging that they are not in complete control of the situation. They are ceding power to others. Such an admission would tend to threaten their egos and thus may be suppressed. This implies that we should hesitate before we fully credit studies, based on reports from the field, which find that law has little to no effect on real world behavior. Sec-

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11. See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 428-30 (1997).

ond, it may be that interviews with lawyers result in overstating the importance of law.

Perhaps the most notable example of this difference in perspective in Professor Keating's piece occurs when he explains why he ended up speaking primarily with lawyers. He notes that, in conducting his interviews, "the most useful interviews seemed to be with in-house counsel . . .," while "[b]usiness people . . . often lack the richness . . . of the in-house counsel."<sup>12</sup> I take the "richness" to which Professor Keating refers as being that lawyers have a more detailed explanation of how they handle the problems raised by section 2-207, the subject of his study. The lawyers, apparently, have thought about this problem a lot, whereas the nonlawyers have not.

One can find a similar difference in perception between lawyers and nonlawyers in Professor Macaulay's article. He reported that "lawyers . . . said businessmen often commit their firms to significant exchanges too casually. . . ."<sup>13</sup> In the same vein, Professor Macaulay found "that businessman are least concerned about planning their transactions so that they are legally enforceable contracts."<sup>14</sup> In short, lawyers focus on the legal aspects of transactions; businessmen do not.

This difference in focus raises important and underresearched questions about how these differences are resolved inside firms. Most large firms contain both nonlawyers and lawyers. After all, while Professor Keating and other individuals speak with individuals, ultimately, it is the firm that becomes a party to the contract. Professor Keating's work sheds light on how decisions in a firm may be reached.

Rightly understood, Professor Keating and those to whom he spoke discuss the general question of contract negotiation. Specifically, they address the decision as to the level of resources that should be invested in contract negotiations. Each party to a potential transaction has to decide what level of resources to spend on negotiating the contract. An ideal contract — what the economists call a fully contingent contract — specifies the rights each party would have against the other under all possible future contingencies. Given the limits of human foresight, such contracts do not exist. Rather, contracts are often incomplete.<sup>15</sup>

A somewhat more attainable goal is what Professor Keating calls a "fully dickered" contract. In this contract, both parties knowingly assent to all of its terms. There may be terms that have been unintentionally left out. Moreover, the terms that are actually in the contract

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12. Keating, *supra* note 1, at 2693.

13. Macaulay, *supra* note 2, at 60.

14. *Id.*

15. On the reasons for incomplete contracts and possible approaches to dealing with such contracts, see Alan Schwartz, *Incomplete Contracts*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 277 (1998).

may not be optimal in that they may not specify the efficient rule in all situations. The defining feature of this contract, however, is that there is no doubt that each party knowingly has consented to the terms that appear in the writings that constitute the contract. Any incompleteness in the contract is due to lack of foresight rather than strategic concerns. When a dispute arises, the parties themselves may try to resolve their dispute in light of the terms to which they agreed. Certainly, if the matter rose to the level of litigation, a court would look to these agreed-to terms for guidance in reaching a decision.

At the other extreme of detail, one can imagine contracts in which the firms only agree to the basic terms of the deal — price, quantity, and delivery. A simple phone call or a trip to the seller may lead to a contract where the parties agree to the bare essentials, and neither makes any effort to provide the nonimmediate terms of the contract. In most cases, the bare essentials complete the transaction, and there is no subsequent dispute. For those cases in which a dispute arises, courts have to supply a “gap filler” to resolve the dispute. In the case of a sale of goods, this gap filler comes from the relevant state’s enactment of the U.C.C.

Somewhere between these two extremes of contractual incompleteness lies the battle of the forms. Each firm puts resources into drafting or selecting a form to use. It then employs internal mechanisms to ensure that the firm’s employees use the form when buying or selling goods. The firm, in this situation, thus spends more resources than when there simply is an agreement on the major terms. The firm, however, does not go to the extreme of trying to reach an agreement on the nonimmediate terms covered by the form. When a dispute arises in cases falling into this intermediate zone, section 2-207 directs a court to the rule of decision.

Were one to assume that firms are rational, money-maximizing entities, one easily could construct a story by which the firm always spends the efficient amount of resources on any given contract. Each firm has to choose the level of resources to invest in contractual negotiations. Perhaps the most interesting finding of Professor Keating in this regard is the extent to which firms choose not to engage in battles of the forms. By my count, at least ten of the twenty-five firms that Professor Keating investigates have decided to avoid a battle of the forms by insisting on a fully dickered contract.<sup>16</sup> The primary reason for this decision seems to be economies of scale. The one unifying factor among these firms is that their transactions involve repeat dealings with other firms.

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16. Professor Macaulay reports similar findings. See Macaulay, *supra* note 2, at 59-60 (of 16 sales managers questioned, 7 stated that they did not engage in transactions which resulted in the exchange of competing forms).



One can readily explain why repeated dealings may lead to more complete contracts. When two parties are going to engage in basically the same transaction over and over, the cost of agreeing on the non-immediate terms is fixed. The nonimmediate terms to which the parties would agree do not vary based on any individual transaction. The value-maximizing provision on consequential damages or warranties is the same in the first transaction as in the hundredth transaction. The parties merely have to agree on that term. The cost of reaching such an agreement does not turn on the number of transactions between the two parties. Put simply, the cost of agreement on nonimmediate terms is a fixed cost.

The cost of not agreeing on nonimmediate terms, however, turns on a variety of factors: the number of transactions that the parties will engage in, the amount at stake in any subsequent dispute, and the likelihood that such a dispute will arise. Each transaction for which the parties do not take the time to reach an agreement on the nonimmediate terms carries with it a risk that a dispute will arise later that will be resolved by something other than the parties' agreement. As the number of transactions increases, the cost of nonagreement increases. Thus, the cost of not agreeing on nonimmediate terms in this setting is a variable cost.

At some point, this variable cost of failing to specify nonimmediate terms will exceed the cost of creating a fully dickered agreement, and the parties will find it in their interest to agree on the nonimmediate terms. Professor Keating's description of the evolution of contractual practices demonstrates that, as one lowers the cost of contracting, parties are more likely to contract for the terms that they determine are in their joint interest.<sup>17</sup> For those firms that have not completely opted out of the battle of the forms, those in charge of contracting use their "situation sense" to identify those transactions where the gains provided by a fully dickered contract exceed the cost of obtaining one.<sup>18</sup> All is well and good.

The story becomes more complicated, and less Panglossian, when we look at how a firm may make a contracting decision. At least in the cases where lawyers have input into the decisionmaking process, it may well be that firms are too quick to engage in detailed negotiations. Inside a firm, there is a basic struggle among various actors for influence and prestige. This struggle can come from a number of

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17. See Keating, *supra* note 1, at 2713-14 (predicting as retailers become larger, they will be more likely to opt for a fully dickered contract).

18. See *id.* at 2698:

[C]ompanies tended to take an ad hoc approach that considered various factors that would weigh in favor of doing a truly integrated contract: the overall size of the deal, the likelihood that a particular buyer-seller relationship would end up being long-term, the reputation of the company on the other side, and any risk that was perceived to be unusual.

sources. Perhaps it is each individual actor's need to portray herself as essential to the mission of the firm. Perhaps it is simply that the higher-up actors have a budget constraint in terms of the time that they can devote to the firm, and it thus behooves those below to compete against each other for attention. Regardless of the animating cause, each actor has to make a claim that she provides an essential service.

This give and take over importance is not confined to the higher reaches of a firm's management. Every person in a firm, regardless of where she is on the firm's hierarchy, has an incentive to overstate her importance. The battle of the forms problem illustrates this point. The question of choosing between a battle of the forms and a fully dickered contract is unlikely to occupy the attention of a firm's Board of Directors or even highly placed members of the management team. The general point is that, regardless of where inside the firm the decision is made, lawyers will have a tendency to highlight legal risks, and nonlawyers will have a tendency to downplay such risks.

In this battle for importance within the firm, the optimal strategy for in-house counsel is clear. The more legal problems that arise and that they can solve, the more their status increases. Indeed, it has been suggested that corporate counsel often have an incentive to overstate legal risk as a way to enhance their prestige inside the firm.<sup>19</sup> Of course, in-house counsel cannot overplay their hand. Legal risks cannot be too great, or too unmanageable; otherwise, outside counsel may be called in. In-house counsel, thus, have to acknowledge both the importance of law — so as to tout their superiority over mere business people — and the importance of the actual business — so as to maintain a comparative advantage over outside counsel. In the case of the battle of the forms, this strategy could take the form of deciding too early that detailed negotiations are necessary. Detailed negotiations that focus on nonimmediate terms are the province of lawyers. Nonlawyers are quite adept at negotiating over price, quantity, and date of delivery. Lawyers, however, have a comparative advantage in wrangling over terms such as warranty and consequential damages. The more important these nonimmediate terms loom in a transaction, the more important the lawyer's input becomes.

To be sure, the nonlawyers in the firm have a countervailing incentive not to credit the importance of legal terms. Whereas lawyers find it in their interest to overstate the importance of law, nonlawyers would benefit by understating it.<sup>20</sup> At the level of theory, one cannot

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19. See Langevoort & Rasmussen, *supra* note 11, at 415-16.

20. A similar situation seems to occur in relations to Electronic Data Interchange agreements. See Keating, *supra* note 1, at 2713-14 ("[M]ost companies do not also use [the negotiation of an EDI agreement] to work out the general terms and conditions of the sale beyond the issues surrounding the electronic mode of communication.").

say with confidence that these effects tend to balance each other out, or that one is stronger than the other. Indeed, the answer may vary from firm to firm.

The one piece of evidence that suggests that firms may overinvest in contractual negotiations is the paucity of litigation after disputes arise. Both Professor Keating and Professor Macaulay found that contract litigation over the battle of the forms is not a frequent occurrence.<sup>21</sup> Both report that disputes generally are worked out without resort to legal process. The salient difference between expenditures on contract negotiation and those on litigation is that, after the fact, it is easier to measure whether the expenditures were cost-justified in the litigation setting. After litigation, a manager overseeing in-house counsel can readily compare litigation's costs with its returns. Such an easy analysis is not available for funds spent on contractual negotiations. There is always a plausible claim that the expenditures prevented future problems. Thus, it may be easier for lawyers inside a firm to make excessive expenditures on contractual negotiations than on contractual litigation.

In sum, once we take into account self-importance bias, the happy story that firms make optimal decisions regarding when to engage in a battle of forms and when to contract out of such a fight may not be true. The decision as to the amount of resources to spend on the nonimmediate terms to a contract may represent, instead, the outcome of a battle between lawyers and nonlawyers inside the firm for a contract. This observation is meant neither as a criticism of those who focus on lawyers or those who do not. Rather, it is simply one of caution. Firms, no less than the people who comprise them, are complex. In looking for the effect of law, we should remember that we do not receive unbiased statements from the front. Rather, we get perception filtered through life experiences.

Typically, the empirical literature on commercial law tends to offer two possible justifications for contracts: they increase efficiency or they enable monopoly.<sup>22</sup> In either situation, the firm is acting rationally. It is entering into a contract that provides value to the firm. Looking inside the firm, however, suggests a third reason for the level of contractual completeness: it is a victory by the attorneys for status.

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21. See Keating, *supra* note 1, at 2696; Macaulay, *supra* note 2, at 61-62. While Professor Keating notes that there is little litigation over section 2-207, Macaulay notes that there is little contract litigation as a general matter. The one thing that we do not know is, in those situations in which litigation over a contract occurs, how often does it involve section 2-207 as opposed to some other basis for dispute.

22. See, e.g., John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2423 (2000).

The more legal issues that have to be negotiated and resolved, the more important the lawyers become.<sup>23</sup>

Perhaps one of the more novel aspects of Professor Keating's study is that he not only inquires into current contracting practices, but he also asks his subjects about their reactions to potential changes in the governing rules. He finds that those he asks, while intrigued by the proposals offered by academics, generally do not favor their enactment. They are comfortable with the status quo, despite the widespread academic criticism of section 2-207.

The question becomes what normative stance should we take towards this information. Many academics have suggested changes in the law, often radical changes. This is true in almost all areas of the law, not just section 2-207. Indeed, I would imagine that one would be hard pressed to find a single legal rule that some academic has not taken issue with except, perhaps, the Thirteenth Amendment. In a world full of proposals for change, what should be the role of professional resistance to these changes?

On the one hand, it may be that those engaged in the daily practice of commerce have a better perspective on reform than do legal commentators. Those on the ground can, drawing on their intuitions honed over a number of years, provide insight as to whether a new approach offers the prospect of beneficial change. They can anticipate how commercial actors would or would not change their behavior based on a change in the governing legal rule. They have what Karl Llewellyn called "situation sense."<sup>24</sup> In the contract arena, they know that, contrary to Professor Goldberg, having a court choose the better form will insert the views of an outsider unschooled in the practical needs of business. They also can discern, contrary to Professors Baird and Weisberg, that having the last form govern will cause more problems than exist under the current regime.

On the other hand, resistance to change may reflect other factors. The lawyers with whom Professor Keating spoke may, like most people, have a bias towards the status quo.<sup>25</sup> Literature from behavioral economics suggests that parties are too wedded to the way things cur-

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23. This notion of lawyers using law to improve their status in a firm gives one pause before accepting entirely the description of lawyers as "transaction cost engineers." See generally, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Symposium: *Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

24. LLEWELLYN, *supra* note 6.

25. See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193. One largely unexplored issue is the extent to which firm structure can dampen the effect of this and other cognitive biases. See Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 VAND. L. REV. 1679, 1687-90 (1998).

rently are. If this is the case, then those with whom Professor Keating spoke may have underestimated the beneficial effect that a substantial reform of section 2-207 could provide.

Somewhat more problematic, as suggested above, is that the Byzantine provisions of section 2-207 may have inadvertently given lawyers power in their relationships with others inside the firm. Indeed, this power may explain the lawyers' resistance to proposals such as the one offered by Professors Baird and Weisberg. These lawyers stated that they like the uncertainty of current law. This taste for uncertainty may flow from the fact that uncertainty raises the status of lawyers within the firm. When a dispute over a transaction arises, the nonlawyers have to turn to the lawyers for guidance.

Note that this explanation can also shed light on their response to Professor Goldberg's proposal. Professor Goldberg's proposal ultimately allows the judge to pick the form that is more fair. This procedure would decrease the role of the lawyers. Indeed, the in-house counsel to whom Professor Keating spoke objected to Professor Goldberg's proposal precisely because it would put too much control in the hands of a judge. Unstated is the corollary that it takes too much power out of the lawyers' hands.

Yet, even if resistance to change is based on a desire to maintain status (or the status quo) rather than on an accurate prediction of the merits of a proposed reform, it may be the case that such resistance still should counsel against the proposed change. Proponents of reform too often implicitly assume compliant actors. The touted benefits materialize because those in the system readily adjust to the new set of rules. A preference for the status quo may well impede the operation of the new regime. Passing a reform that will not be embraced by those who must implement it may well be a cost of that change. Bias may not be justified, but it is nevertheless real.

### CONCLUSION

The current wave of empirical research undoubtedly enriches our understanding of the relationship between legal rules and business decisions. Rather than rely on theoretical models of how people should act, it provides us with data on how people do act. But once we substitute the reports of individuals for those of models, we have to be cognizant of the possibility that real people may not be as candid as models in stating how they reached their conclusions. Well-constructed models specify their underlying assumptions and the reasoning process that they use in each step of the analysis. Even the more thoughtful of us may be unaware of the biased lens through which we see the world.